No. 15-423

IN THE

Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
AND PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
AND HELMERICH & PAYNE DE VENEZUELA, C.A.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether jurisdiction under the expropriation exception of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(3), is established where the required commercial-activity nexus to the United States is present and the complaint puts in issue a substantial claim that rights in property have been taken in violation of international law.

CORPORATE DISCLOSURE STATEMENT

Helmerich & Payne International Drilling Company is a wholly owned subsidiary of Helmerich & Payne, Inc. Blackrock, a publicly traded company, owns approximately 10 percent of the stock of Helmerich & Payne, Inc.

Helmerich & Payne de Venezuela, C.A. is a wholly owned subsidiary of Helmerich & Payne International Drilling Company.

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BRIEF FOR RESPONDENTS

INTRODUCTION

This Court has long held that where a statute confers subject-matter jurisdiction over a particular class of cases, the assertion of a substantial claim within that class establishes jurisdiction for the court to decide the claim one way or the other. The possibility that the allegations might not entitle the plaintiff to relief does not defeat jurisdiction. That rule was "well settled" when the Court decided *Bell* v. *Hood*, 327 U.S. 678, 682 (1946). It describes the Court's "[n]ormal practice" across a range of contexts. *Jerome B. Grubart* v. *Great*

Lakes Dredge & Dock Co., 513 U.S. 527, 537 (1995). And it derives not from the "particular phrasing" of any one statute, *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1570 (2016), but from the very "nature of the jurisdictional inquiry," *Sisson* v. *Ruby*, 497 U.S. 358, 365 (1990), and the problems that would follow if jurisdiction depended on the merits.

Petitioners urge the Court to abandon that rule in cases brought under the expropriation exception of the Foreign Sovereign Immunities Act, which authorizes courts to decide certain claims against foreign sovereigns where "rights in property taken in violation of international law are in issue." Respondents asserted such a claim here, seeking redress for the unlawful expropriation of their entire U.S.-owned drilling business in Venezuela—an expropriation that was motivated by the discriminatory animus of Venezuela's Chávez regime toward the United States and U.S.-owned companies, and for which respondents have never received one penny of the compensation required by international law.

Petitioners contested the district court's jurisdiction on the ground that respondents were not legally entitled to relief because the allegations did not show a taking of their rights in property in violation of international law. Applying *Bell*, the court of appeals correctly held that petitioners' merits-based arguments could not defeat jurisdiction so long as respondents' claims were substantial—as indeed they are.

In urging the Court to disregard *Bell*, petitioners emphasize that the FSIA prescribes substantive standards defining foreign sovereigns' immunity from suit, and that courts must determine at the outset whether those standards are "actually" met. Those propositions

are undoubtedly correct. But they only beg the question: What substantive standards does the statute impose? The text, structure, history, and purposes of the FSIA dictate that jurisdiction lies under the expropriation exception where the complaint (1) actually satisfies detailed territorial and commercial nexus requirements, and (2) actually puts "in issue" a claim that the plaintiff's rights in property have been taken in violation of international law. The latter is precisely the type of inquiry *Bell* governs, and nothing in the FSIA displaces that rule that the possibility a claim might fail does not defeat the court's jurisdiction to decide it.

Petitioners' view—that a court has no authority to decide whether rights in property were taken in violation of international law unless it first concludes that rights in property were taken in violation of international law—would not shield sovereigns from any burdens of litigation. It would simply frontload those burdens into the jurisdictional stage, including potentially broad discovery into the factual basis of the claim. This Court has consistently rejected similar approaches to federal jurisdiction. It should do so again here.

STATEMENT

A. Respondents' Venezuelan Business[1]

Respondent Helmerich & Payne International Drilling Company ("H&P-IDC") is a Delaware corporation based in Tulsa, Oklahoma. For more than five decades, H&P-IDC ran a successful drilling business in Venezuela, working through a wholly owned subsidiary

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[1] The Statement relies on the complaint's allegations, which the parties agreed must be accepted as true for present purposes. JA132-133.

—most recently, respondent Helmerich & Payne de Venezuela ("H&P-V").

H&P-IDC conducted its Venezuelan operations from the United States by supplying H&P-V with powerful land-based drilling rigs and equipment. JA61. From the United States, H&P-IDC provided continuous technical and administrative guidance and made all significant strategic and operational decisions, such as whether to transfer equipment between regions and whether to enter into particular contracts. JA92-93. Although H&P-V is incorporated in Venezuela, the Venezuelan government designated and treated it as a "FOREIGN COMPANY at all relevant legal effects" due to its 100% U.S. ownership. JA83-84.

After Venezuela nationalized its oil industry in the 1970s, H&P-V began providing services—eventually, exclusively—to Venezuela's state-owned oil companies, petitioners Petróleos de Venezuela, S.A. and PDVSA Petróleo, S.A. (together, "PDVSA"). JA59-60, 125. Both entities are agencies or instrumentalities of petitioner Venezuela. JA126. H&P-V worked under recurring contracts with PDVSA. The most recent contracts were signed in 2007. JA65, 126-127, 171-172.

Shortly after executing the 2007 contracts, PDVSA fell substantially behind on payments. JA69, 128-129, 172. Despite H&P-V's complete performance, PDVSA failed to pay tens of millions of dollars due under the contracts. JA172-173. PDVSA acknowledged its debt and promised to pay, but never did. JA69-70, 129. In 2009, H&P-V told PDVSA it would not extend the contracts until PDVSA met its obligations. JA128-129. As the term of each contract ended, H&P-V disassembled its rigs and stacked its equipment in its Venezuelan yards pending payment. *Id.*

B. The Expropriation

PDVSA's refusal to honor its commitments came amid intensifying hostility by the Venezuelan government toward the United States and U.S.-owned companies. JA84-88. As reported by the U.S. State Department, then-President Hugo Chávez "define[d] himself in opposition to the United States, using incendiary rhetoric to insult the U.S. Government and U.S. influence in Latin America." JA86. Venezuela expelled the U.S. ambassador in 2008 and deepened ties with U.S. adversaries, while senior officials directed vitriolic rhetoric against U.S. companies. JA86, 88. The U.S. Commerce Department reported a campaign of "active discrimination" by the Venezuelan government against American businesses. JA87.

In June 2010, without apparent legal authority, PDVSA employees assisted by armed soldiers of the Venezuelan National Guard blockaded H&P-V's facilities in western Venezuela and similarly seized H&P-V's headquarters in eastern Venezuela a few days later. JA72. Two weeks later, the National Assembly issued a "Bill of Agreement" declaring the "public utility and social interest" of H&P-V's rigs and assets. JA74, 174. President Chávez issued an Expropriation Decree that day, belatedly authorizing the "forcible taking" of H&P-V's rigs and "all the personal and real property and other improvements made by [H&P-V]." JA74, 129-130. The Decree declared H&P-V's property "the unencumbered and unlimited property of PDVSA, S.A., or its designee affiliate, as expropriating entity." JA74.

As the complaint explains in detail, petitioners targeted and seized respondents' business because of the Chávez regime's pervasive anti-American animus. PDVSA and Venezuelan officials stated publicly at the

time that H&P-V was taken because of its U.S. ownership. On June 23, 2010, before the Venezuelan government authorized the expropriation, PDVSA trumpeted its seizure of a U.S.-owned business: "The Bolivarian Government, through [PDVSA] [had] nationalized 11 drilling rigs" belonging to "the company Helmerich & Payne (HP), a U.S. transnational firm." JA73. Two days later, PDVSA boasted about "[t]he nationalization of the oil production drilling rigs from the American contractor H&P" and "reject[ed] statements made by spokesmen of the American empire—traced [sic] in our country by means of the oligarchy." JA74, 85. It declared that the drills would "be operated by PDVSA as a company of all Venezuelans"—no longer the property of an "American company." JA85.

When the National Assembly passed the Bill of Agreement, the President of the Assembly's Committee on Energy and Mines accused opponents of the expropriation of acting "in accordance with the instructions of the [U.S.] Department of State" and trying to "subsidize the big business transnational corporations, so that they can promote what they know best to do, which is war, ... through the large military industry, of the Empire and its allies." JA84. Two days later, Venezuela's oil minister—who also served as PDVSA's president—spoke at a political rally in H&P-V's yard, condemning respondents' "foreign gentlemen investors" and announcing that employees of "this American company" would become employees of PDVSA. JA83; *see* JA173-175.

PDVSA now operates respondents' former business, using all of respondents' confiscated real and personal property—including the specialized drilling rigs and equipment, vehicles, office space, and maintenance forms—and employing H&P-V's rig managers, rig

workers, and other professionals to perform the functions the business had performed when run by respondents. JA76-78. Respondents no longer maintain any significant tangible property or commercial operations in Venezuela. Stripped of all its productive assets, H&P-V ceased to operate and no longer exists as a going concern. JA77-78.

In the ensuing six years, respondents have received no compensation. PDVSA initiated eminent-domain proceedings in Venezuela in July 2010, JA75-76, and respondents have participated as required under Venezuelan procedural rules. But those proceedings remain stalled indefinitely.

Nor can any compensation be expected. JA98-102. Private parties rarely prevail against the government in Venezuela's politically controlled courts. Out of 325 suits against the government surveyed by the U.S. State Department in 2009, the court ruled in the government's favor 324 times; the sole exception was later annulled. JA100-101. According to a 2010 report of the Inter-American Commission on Human Rights, Venezuelan judges handing down decisions negatively affecting government interests have been removed from the bench or even prosecuted and held under inhumane conditions. JA101. And as the U.S. Trade Representative reported in 2011, out of 76 companies nationalized under one 2009 law, none received compensation. JA80.

C. Proceedings Below

In September 2011, respondents sued petitioners for a taking in violation of international law, asserting jurisdiction under the expropriation exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA"). JA103-104, 131. That provision abrogates sovereign

immunity and authorizes U.S. courts to decide claims against a foreign state or its agencies and instrumentalities in any case where there is a commercial-activity nexus to the United States and where "rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3); *see id.* § 1330(a).[2]

Nearly a year after the complaint was filed, petitioners moved to dismiss. Proceeding under Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6), petitioners challenged the expropriation claims for lack of subject-matter jurisdiction, lack of standing, and lack of personal jurisdiction, as well as under the act-of-state doctrine and *forum non conveniens*. JA118. Apart from their act-of-state argument, petitioners did not move, and have never moved, to dismiss for failure to state a claim. *Id.*

Because some of petitioners' arguments raised factual challenges to jurisdiction, respondents served requests for jurisdictional discovery, as permitted by circuit precedent holding that when a motion to dismiss challenges the factual basis of FSIA jurisdiction, the court "must go beyond the pleadings" to resolve the factual dispute after allowing an appropriately tailored opportunity for jurisdictional discovery. *Phoenix Consulting, Inc.* v. *Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000); *see* U.S. Br. 14 n.2. Petitioners refused to respond, so respondents moved to compel. JA3, 118.

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[2] H&P-V also alleged breach-of-contract claims against PDVSA, asserting jurisdiction under the FSIA's commercial-activity exception, 28 U.S.C. § 1605(a)(2). Those claims are pending in a separate petition for certiorari. *Helmerich & Payne Int'l Drilling Co.* v. *Bolivarian Republic of Venezuela*, No. 15-698 (Nov. 25, 2015).

The parties resolved the dispute by agreeing in a joint stipulation to litigate four legal questions based on the allegations in the complaint—before any jurisdictional discovery—and to defer petitioners' other defenses for later adjudication after jurisdictional discovery. JA117-123. Among the four initial issues were two of petitioners' legal challenges to subject-matter jurisdiction under § 1605(a)(3). First, petitioners contended that their taking of property owned by H&P-V could not violate international law because H&P-V is incorporated in Venezuela. Second, petitioners contended that H&P-IDC's own "rights in property" were not taken in violation of international law because H&P-V held legal title to the seized assets. JA119-120, 134-142, 160-168, 177-178.

The district court rejected petitioners' latter argument and denied the motion to dismiss H&P-IDC's claim. JA160-169. The court granted the motion to dismiss H&P-V's claim. JA134-142, 168-169.

The U.S. Court of Appeals for the D.C. Circuit affirmed in part and reversed in part. In an opinion by Judge Tatel, joined by Chief Judge Garland, the court began by underscoring "the distinction between jurisdiction—a court's constitutional or statutory power to decide a case—and ultimate success on the merits." JA178. Citing *Bell* v. *Hood*, 327 U.S. 678 (1946), the court observed that "'[j]urisdiction ... is not defeated ... by the possibility that the averments [in a complaint] might fail to state a cause of action on which [the plaintiffs] could actually recover.'" JA178. The court therefore followed circuit precedent holding, consistent with *Bell*, that a motion to dismiss a FSIA claim on the ground that the plaintiff has not pleaded a taking of rights in property in violation of international law should be granted only if the claim is "'wholly insub-

stantial or frivolous.'" *Id.* (citing *Agudas Chasidei Chabad* v. *Russian Fed'n*, 528 F.3d 934, 943 (D.C. Cir. 2008)). Under that standard, the court held that respondents' expropriation claims could proceed.

As to H&P-V, the court acknowledged that a state's expropriation of its own national's property "generally" does not violate international law, JA179, but held that this "domestic takings rule" did not resolve the case in light of the complaint's allegations that petitioners "unreasonably discriminated against [H&P-V] on the basis of its sole shareholder's nationality," JA180. Those allegations "implicat[ed] an exception to the domestic takings rule" for discriminatory takings in which a state targets a domestically incorporated but foreign-owned corporation for expropriation based on the nationality of its owners. *Id.* The court found "'persuasive'" the Second Circuit's reasoning in *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962), *see* JA181, which considered the Castro regime's similar expropriation of U.S.-owned businesses incorporated in Cuba. *Sabbatino* held that "'[w]hen a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent for [the court] in passing on the validity of that treatment to look only to the 'nationality' of the corporate fiction.'" JA180 (quoting *Sabbatino*, 307 F.2d at 861); *see also Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166, 185 (2d Cir. 1967) (reaffirming *Sabbatino* "with emphasis"). The D.C. Circuit found that holding consistent with the *Restatement (Third) of Foreign Relations Law*, which "recognizes discriminatory takings as a violation of international law," and "cite[s] *Sabbatino* as an example" of an unlawful "discriminatory taking." JA180-181 (discussing *Restatement (Third) of Foreign Relations Law* § 712 cmt. f & reporter's note 5

(1987) ("*Restatement (Third)*")). The court emphasized that respondents' allegations "could be viewed as demonstrating 'unreasonable distinction' based on nationality" and were therefore "sufficient to plead a 'non-frivolous' discriminatory takings claim," JA182-183—particularly in light of petitioners' failure to cite any authority foreclosing H&P-V's claim, JA182.[3]

As to H&P-IDC, the court held that even though H&P-IDC did not own legal title to the expropriated assets, it had "sufficient rights in [the expropriated] property to support its expropriation claim." JA171. The court rejected petitioners' arguments, based on *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003), that "rights in property" under the expropriation exception "must mean corporate ownership." JA184. The court explained that *Dole Food* considered a separate provision of the FSIA that—unlike the expropriation exception—"expressly 'speaks of ownership'" of shares. *Id.* (discussing 28 U.S.C. § 1605(b)(2)). Because the expropriation exception "speaks only of 'rights in property'

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[3] Petitioners relied below, as they do here (at 44-45), on *Barcelona Traction, Light & Power Co. (Belgium* v. *Spain)*, 1970 I.C.J. 3 (Feb. 5). The court of appeals did not find that decision to bar H&P-V's claim, *see* JA179-182—likely because the International Court of Justice there did not consider the question in *Sabbatino* and this case, but instead examined the very different question of countries' respective rights to assert "diplomatic protection" of a corporation. It held only that, as among sovereigns competing to espouse a private claim against another sovereign, the state of incorporation has a right superior to the shareholder's state to assert the corporation's interests against a third state. Even in that context, the ICJ stressed that when the state of incorporation is itself responsible for the injury, "considerations of equity might call for ... protection of the shareholders ... by their own national State." 1970 I.C.J. at 48 ¶¶ 92-93; *see Restatement (Third)* § 213 reporters' note 3 (1987).

generally, not ownership in shares," the court of appeals here followed the analysis in *Permanent Mission of India* v. *City of New York*, 551 U.S. 193, 197 (2007), which held that the phrase "rights in immovable property" in § 1605(a)(4) is not limited to "ownership or possession," but "'focuses more broadly on "rights in" property.'" JA185. And the court looked to circuit precedent holding that "corporate ownership of land and property ... does not deprive the sole beneficial owners—United States citizens—of a property interest" of their own. JA186 (quotation marks omitted). The court found that precedent "especially persuasive" because H&P-IDC "has suffered a total loss of control over its subsidiary, which has ceased operating as an ongoing enterprise because *all* of its assets were taken." JA187.

Judge Sentelle dissented as to the expropriation issues. JA194-199.

The court of appeals denied rehearing, JA44-45, and denied petitioners' motion to stay the mandate, JA46. The Chief Justice denied petitioners' application to this Court for a stay of the mandate. No. 15A258 (Sept. 1, 2015).

The case returned to the district court, where petitioners' other jurisdictional defenses remained pending. Among those defenses, petitioners contended that respondents' claims did not satisfy the expropriation exception's nexus requirement that, as relevant here, the expropriated property or its proceeds be "owned or operated by an agency or instrumentality of the foreign state ... that ... is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). Because petitioners denied that those conditions were met, respondents sought jurisdictional discovery—consistent

with D.C. Circuit precedent, *supra* p. 8, and with the parties' agreement in the joint stipulation, JA120-121—tailored to determine the ownership or operation of the expropriated assets. *See* JA17-20. Despite the court's order setting deadlines for that limited jurisdictional discovery as contemplated by the joint stipulation, petitioners resisted discovery, and the court ultimately ordered them to respond to some requests. JA18-35.

Meanwhile, petitioners sought review of the court of appeals' decision in this Court, presenting two international-law issues and a third question concerning the application of *Bell* v. *Hood*. The Court granted the petition, limited to the *Bell* v. *Hood* question, and did not grant review of the international-law issues. The district court stayed further proceedings. JA35.

SUMMARY OF ARGUMENT

This Court has consistently held that "[j]urisdiction ... is not defeated ... by the possibility that the averments [in a complaint] might fail to state a cause of action on which [the plaintiff] could actually recover." *Bell* v. *Hood*, 327 U.S. 678, 682 (1946). Contrary to petitioners' assertion (at 16), that rule was not specially "created" in *Bell* for use only in § 1331 cases. Long before *Bell* and since, the Court has followed that rule in evaluating jurisdiction under a wide range of statutes, regardless of variations in their text or policies. That ordinary practice reflects the nature of the jurisdictional inquiry and obviates a host of practical difficulties that would arise if a claim's merit were a jurisdictional requirement.

That rule dictates the outcome here. Under the expropriation exception, a foreign state "shall not be immune" from suit in the United States "in any case" in

which (1) the requisite commercial-activity nexus exists, and (2) "rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). The latter prong requires that the plaintiff put "in issue" a claim that rights in property have been taken in violation of international law—the very type of inquiry that *Bell* routinely governs. That interpretation is compelled by the Act's use of the phrase "in issue," which simply asks what assertions are "in dispute" or "under discussion." It is compelled by the Act's history, which confirms that Congress enacted the expropriation exception to provide a U.S. forum to decide on the merits claims seeking a remedy for the unlawful taking of property by a foreign state. And it is compelled by the Act's structure, which imposes "substantive provisions requiring some form of substantial contact with the United States" and delineates "the types of actions for which foreign sovereigns may be held liable." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 490, 496-497 (1983). When a complaint asserts "the type[] of action[]" authorized by the FSIA, *id.* at 496, and bears the prescribed contacts with the United States, the FSIA's "detailed federal law standards" are met, *id.* at 494, immunity from suit is abrogated, and the court has jurisdiction over the subject matter. Nothing in the FSIA displaces the longstanding, widespread practice that the possibility a claim might fail on its merits does not defeat the court's jurisdiction to decide the merits, at least where the claim is not "clearly ... immaterial and made solely for the purpose of obtaining jurisdiction" or "wholly insubstantial and frivolous." *Bell*, 327 U.S. at 682-683.

Petitioners would surely prefer to resolve the merits question whether the complaint states a violation of international law for which respondents are entitled to

relief before litigating jurisdiction. Article III dictates otherwise. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83 (1998). Petitioners therefore seek an end-run around *Steel Co.* by conflating the merits question with the standard defining the court's jurisdiction to decide. But the purpose of the FSIA's jurisdictional grant is to abrogate the foreign sovereign's immunity from suit in order to allow the court to decide whether a violation has occurred for which plaintiffs are entitled to relief. It makes no sense to require courts to decide that merits question in order to determine their authority to decide it. And imposing that requirement would significantly complicate the litigation of FSIA claims by expanding the jurisdictional determination to include the full range of disputes that might arise on the merits, both legal and factual—with the added complexity that unless the rigorous standard of implied waiver of immunity is met, those merits disputes could not be waived, must be considered by courts *sua sponte*, and would presumably be the subject of repeated interlocutory appeals. Abandoning *Bell* would thus do nothing to promote comity or shield foreign sovereigns from the burdens of litigation. It would do the opposite. Absent any indication that Congress intended that result, the Court should adhere to its longstanding and well-settled jurisdictional practice.

ARGUMENT

I. JURISDICTION IS NOT DEFEATED BY THE POSSIBILITY A COMPLAINT MIGHT FAIL TO STATE A CLAIM

A. Subject-Matter Jurisdiction Does Not Turn On The Merits

It is "firmly established in [this Court's] cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction,

i.e., the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). "Whether the complaint states a cause of action on which relief could be granted ... must be decided after and not before the court has assumed jurisdiction over the controversy." *Bell* v. *Hood*, 327 U.S. 678, 682 (1946); *see also Shapiro* v. *McManus*, 136 S. Ct. 450, 455 (2015) ("[w]e have long distinguished between failing to raise a substantial federal question for jurisdictional purposes ... and failing to state a claim for relief on the merits").

Petitioners portray that rule as an outlier, cabined to issues of federal-question jurisdiction under 28 U.S.C. § 1331. Their contention disregards nearly two centuries of precedent. This Court has long adhered to the foundational principle that where a provision confers jurisdiction over a particular type of claim, jurisdiction is established if the plaintiff asserts a claim within the defined class that is not wholly insubstantial or frivolous. The possibility that the claim might fail does not oust the court of jurisdiction to decide it.

This proposition is commonly attributed to *Bell*, but its roots run much deeper. In *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 822 (1824), Chief Justice Marshall explained that a court's subject-matter jurisdiction "depend[s] on the character of the cause," not its merit. It therefore suffices to establish jurisdiction under Article III's "arising under" clause where:

> the title or right set up by the party, may be defeated by one construction of the constitution or laws of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out.

Id. As Justice Holmes later put it, "if [a] bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not." *Hart* v. *B.F. Keith Vaudeville Exch.*, 262 U.S. 271, 273 (1923); *see also, e.g.*, *Huntington* v. *Laidley*, 176 U.S. 668, 679 (1900); *Swafford* v. *Templeton*, 185 U.S. 487, 493 (1902). By the time the Court decided *Bell*, it was "well settled" that so long as a claim is not "wholly insubstantial and frivolous," "[j]urisdiction ... is not defeated ... by the possibility that the averments [in a complaint] might fail to state a cause of action on which [the plaintiff] could actually recover." 327 U.S. at 682-683.

Although the Court first articulated this rule in defining courts' jurisdiction to consider cases "arising under" the Constitution and laws of the United States, the rule's development—contrary to petitioners' thesis—"[wa]s not grounded in [the 'arising under'] provision's particular phrasing." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1570 (2016). Rather, the rule derives from the very "nature of the jurisdictional inquiry," *Sisson* v. *Ruby*, 497 U.S. 358, 365 (1990), and the limits of courts' authority to act without jurisdiction.

Jurisdiction, this Court has frequently explained, is simply a court's "power to consider and decide one way or the other, as the law may require." *Geneva Furniture Mfg. Co.* v. *S. Karpen & Bros.*, 238 U.S. 254, 259 (1915); *see also, e.g.*, *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 577 (1999) ("authority over the category of claim in suit"); *Hagans* v. *Lavine*, 415 U.S. 528, 538 (1974) ("authority conferred by Congress to decide a given type of case one way or the other"); *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("authority to decide the case either way"). Because juris-

diction "refers to a tribunal's power to hear a case," it "presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief." *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 254 (2010) (quotation marks omitted). The jurisdictional question is "legally and analytically antecedent" to the merits, *Sisson*, 497 U.S. at 365, and is "not to be declined merely because it is not foreseen with certainty that the outcome will help the plaintiff," *Geneva Furniture*, 238 U.S. at 259. Rather, as petitioners emphasize (at 21), a court must determine its jurisdiction at the outset; until it has done so, pronouncing upon the merits would "carr[y] the court[] beyond the bounds of authorized judicial action and thus offend[] fundamental principles of separation of powers." *Steel Co.*, 523 U.S. at 94; *see Ruhrgas*, 526 U.S. at 583.

The Court's long adherence to the *Bell* rule also reflects concern for what it has recognized are "drastic" consequences that would flow from treating a claim's merit as a threshold jurisdictional requirement. *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011); *see Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 513-516 (2006). Because subject-matter jurisdiction "'involves a court's power to hear a case,'" it can "'never be forfeited or waived'" unless the stringent test for waivers of immunity is met, and "courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh*, 546 U.S. at 514; *see also, e.g.*, *Henderson*, 562 U.S. at 434-435 ("Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system."). For example, statutory arguments concerning the scope of jurisdiction "would have to be considered by this Court even though not raised

earlier in the litigation—indeed, this Court would have to raise them *sua sponte*," *Steel Co.*, 523 U.S. at 93, resulting in potential "waste of judicial resources" and "unfair[] prejudice [to] litigants," *Henderson*, 562 U.S. at 434; *see also Arbaugh*, 546 U.S. at 514. The Court has thus consistently rejected attempts to "forestall the ultimate action of the court by attacking its jurisdiction upon propositions which belong to the merits." *Illinois Cent. R.R. Co.* v. *Adams*, 180 U.S. 28, 40 (1901).

B. The *Bell* Rule Applies In A Wide Range Of Contexts

Given that it derives from practical considerations and "the nature of the jurisdictional inquiry," *Sisson*, 497 U.S. at 365, rather than the "particular phrasing" of any single provision, *Manning*, 136 S. Ct. at 1570, the Court has never limited the *Bell* rule to determinations of federal-question jurisdiction under § 1331. Contrary to petitioners' contentions, *Bell* constitutes the Court's "[n]ormal practice" across a wide range of jurisdictional determinations. *Jerome B. Grubart* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 537 (1995). Some of those contexts involve provisions that, like § 1331, employ the "arising under" phrasing, such as where jurisdiction arises under the patent laws, *see, e.g.*, *The Fair*, 228 U.S. at 25; *Geneva Furniture*, 238 U.S. at 258-259; *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U.S. 282, 285-286 (1902), or under laws regulating commerce, *see Louisville & Nashville R.R. Co.* v. *Rice*, 247 U.S. 201, 203 (1918). But the Court has also applied the *Bell* principle under statutes that use entirely different language to define the claims they authorize courts to decide.

1. Sherman Act

The Sherman Anti-Trust Act gave courts "jurisdiction to prevent and restrain violations of th[at] act." Act of July 2, 1890, 26 Stat. 209, 209.[4] In *Binderup* v. *Pathe Exchange, Inc.*, 263 U.S. 291, 304-305 (1923), the defendants argued that the plaintiffs "failed to state facts sufficient to constitute a cause of action" showing a violation of the Act, and the lower courts treated that failure as a jurisdictional defect. This Court reversed. Although the Sherman Act spoke of "violations" instead of claims "arising under" the statute, *cf.* Pet. Br. 32—or of "alleged" or "asserted" violations, *cf.* U.S. Br. 29—the Court explained that because jurisdiction is simply "the power to decide a justiciable controversy," it cannot turn upon the merits:

> A complaint, setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court, and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it.

263 U.S. at 305-306.

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[4] Before 1980, federal jurisdiction over cases "arising under" the Constitution and laws of the United States was limited by a statutory amount-in-controversy requirement. *See Arbaugh*, 546 U.S. at 505-506. Individual statutes' jurisdictional grants therefore determined courts' authority to adjudicate claims under those statutes. *Id.*

2. Bankruptcy

Under the Bankruptcy Act of 1903, trustees were authorized to set aside certain preferences and fraudulent transfers and to recover the transferred property into the estate; the district courts had jurisdiction "[f]or the purpose of such recovery." *Stellwagen* v. *Clum*, 245 U.S. 605, 614 (1918) (quotation marks omitted); *see Flanders* v. *Coleman*, 250 U.S. 223, 227 (1919). In *Flanders*, the district court dismissed a suit for lack of jurisdiction after concluding that no preference or fraudulent transfer had been shown. 250 U.S. at 228. Although the statute did not use "arising under" language, this Court reversed, holding that consideration of the merits was not a proper basis for declining jurisdiction where "there was enough alleged to properly invoke jurisdiction":

> As this court has not infrequently said, jurisdiction must be determined not upon the conclusion on the merits of the action, but upon consideration of the grounds upon which federal jurisdiction is invoked.

Id. at 228-229; *see also First Nat'l Bank of Denver* v. *Klug*, 186 U.S. 202, 204 (1902).

3. Criminal law

The Judicial Code of March 3, 1911, gave the district courts jurisdiction "[o]f all crimes and offenses cognizable under the authority of the United States." Pub. L. No. 61-475, § 24, 36 Stat. 1087, 1091 (1911). In *Lamar* v. *United States*, 240 U.S. 60 (1916), the defendant challenged the district court's jurisdiction on the ground that the indictment did not charge a crime against the United States. Writing for the Court, Justice Holmes rejected that argument:

> [N]othing can be clearer than that the district court, which has jurisdiction of all crimes cognizable under the authority of the United States, acts equally within its jurisdiction whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong. The objection that the indictment does not charge a crime against the United States goes only to the merits of the case.

Id. at 64 (citation omitted); *see also Louie* v. *United States*, 254 U.S. 548, 550-551 (1921) (defendant's argument that "an essential element of the crime against the United States was lacking" "did not raise a question properly of the jurisdiction of the court, but went to the merits").

The Court continued to follow that rule under the modern statutory grant of criminal jurisdiction. Under 18 U.S.C. § 3231, district courts have original and exclusive jurisdiction "of all offenses against the laws of the United States." In *United States* v. *Williams*, 341 U.S. 58 (1951), a perjury case, the lower courts held that the court in which the alleged perjury occurred had acted without jurisdiction—and that the defendant's conduct therefore did not constitute perjury—because the indictment in that proceeding had not stated a cognizable offense within the court's jurisdiction under § 3231. Citing *Bell*, this Court rejected that conclusion:

> The District Court had jurisdiction of offenses against the laws of the United States. Hence, it had jurisdiction of the subject matter, to wit, an alleged violation of the federal conspiracy statute, and, of course, of the persons charged.

> ... The circumstance that ultimately it is determined on appeal that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment.

Id. at 66.

4. Admiralty

The *Bell* rule constitutes the "[n]ormal practice" in admiralty jurisdiction, *Jerome B. Grubart*, 513 U.S. at 537, where the jurisdictional statute "giv[es] federal district courts 'original jurisdiction ... of ... [a]ny civil case of admiralty or maritime jurisdiction,'" *id.* at 531 (quoting 28 U.S.C. § 1333(1)). The Court has held, for example, that jurisdiction over maritime torts should not turn on a close examination of the particular causes of the alleged harm, because in making that inquiry a court "would have to decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdictional question." *Sisson*, 497 U.S. at 365; *see also Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 359 (1959) (regardless whether Jones Act provided a right of action for an alien seaman against a foreign shipowner, plaintiff asserted a "substantial claim" that was "sufficient to empower the District Court to assume jurisdiction over the case and determine whether, in fact, the Act does provide the claimed rights").

5. Section 1343(3)

The same approach governs 28 U.S.C. § 1343(3), which grants district courts "'jurisdiction of any civil action ... [t]o redress the deprivation, under color of any State law, ... of any right, privilege or immunity secured by the Constitution of the United States or by

any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.'" *Hagans*, 415 U.S. at 553. In *Hagans*, the court of appeals held that the plaintiff's equal protection claim failed rational-basis review and that the district court therefore lacked jurisdiction. *Id.* at 541-542. This Court reversed. Although the lower court's analysis of the equal protection claim might have "prove[d] correct," *id.* at 542, the claim was not so frivolous or insubstantial as to be outside the court's jurisdiction, *id.* at 539-540. The Court held that "the admonition of *Bell* v. *Hood* ... should be followed here"—namely, that "'[j]urisdiction ... is not defeated ... by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.'" *Id.* at 542; *see also Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993) (although plaintiff's claims under § 1985 failed, they were not "'wholly insubstantial and frivolous,' ... so as to deprive the District Court of jurisdiction" under § 1343(3)); *Baker* v. *Carr*, 369 U.S. 186, 199-201 (1962) (subject-matter jurisdiction lay under § 1343(3) where claim was not frivolous).[5]

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[5] As its sole example of an alleged exception to the *Bell* rule, the United States cites (at 18 n.3) *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), which involved a § 1983 suit against a municipal corporation. Citing later-rejected precedent that municipal corporations were not subject to suit under § 1983, the Court stated in dicta that if jurisdiction had been asserted under § 1343, "it would [have been] appropriate for this Court to inquire, for jurisdictional purposes, whether a statutory action had in fact been alleged." *Id.* at 278-279. But making a threshold determination that the named defendant is a proper defendant does not contravene *Bell*, any more than it would to determine at the threshold of a FSIA case whether a defendant is an "agency or instrumentality of a foreign state," *see* 28 U.S.C.

6. Securities Exchange Act

Section 78aa of Title 15 gives district courts "'exclusive jurisdiction of violations of [the Exchange Act] or the rules and regulations thereunder.'" *Morrison*, 561 U.S. at 254 n.3. In *Morrison*, the court of appeals affirmed a Rule 12(b)(1) dismissal of a securities class action for lack of subject-matter jurisdiction on the ground that § 10(b) of the Exchange Act did not apply extraterritorially. *Id.* at 253. This Court agreed that the plaintiffs failed to state a claim on which relief could be granted, *id.* at 273, but corrected the court of appeals' "threshold error" in finding a lack of jurisdiction, *id.* at 253. Citing *Bell*, the Court contrasted the "merits question" of "what conduct § 10(b) reaches"—which would determine whether a plaintiff's "allegations ... entitle him to relief"—from the "quite separate" issue of subject-matter jurisdiction, which "refers to a tribunal's power to hear a case." *Id.* at 254 (quotation marks omitted). The Court underscored that although the plaintiffs' allegations did not entitle them to relief under § 10(b), the district court had jurisdiction under 15 U.S.C. § 78aa to adjudicate the question. *Id.*

7. Tucker Act

Although this Court has not squarely addressed the issue, the lower federal courts have consistently followed *Bell* in evaluating their exclusive jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1), which waives the United States' sovereign immunity for specified types of claims, *see United States* v. *Mitchell*, 463 U.S. 206, 212 (1983); *Eastern Enters.* v. *Apfel*, 524 U.S.

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§ 1603(b). Moreover, the Court in *Mt. Healthy* did not say what standard would apply in conducting that inquiry and did not purport to overrule *Hagans*.

498, 520 (1998). Citing *Bell*, the Court of Claims has held that where a plaintiff claims entitlement to a money award from the United States, the plaintiff "can properly come to the Court of Claims, at least if his claim is not frivolous but arguable." *Ralston Steel Corp.* v. *United States*, 340 F.2d 663, 667 (Ct. Cl. 1965), *cited with approval in Mitchell*, 463 U.S. at 217 n.16. Any argument that the plaintiff is not entitled to relief "wrongly equates the issue of jurisdiction with the merits." *Id.*; *see also Engage Learning, Inc.* v. *Salazar*, 660 F.3d 1346, 1353-1354 (Fed. Cir. 2011); *Aerolineas Argentinas* v. *United States*, 77 F.3d 1564, 1572 (Fed. Cir. 1996). That approach governs claims seeking compensation for a taking, as to which jurisdiction "is proper" when plaintiff asserts "a nonfrivolous takings claim founded upon the Fifth Amendment." *Moden* v. *United States*, 404 F.3d 1335, 1341 (Fed. Cir. 2005). The Court of Federal Claims thus routinely exercises jurisdiction over nonfrivolous takings claims against the United States even where the plaintiff ultimately fails to establish a compensable taking of cognizable property interests. *E.g.*, *Chittenden* v. *United States*, 126 Fed. Cl. 251, 259-266 (2016).

In each of these contexts, the statutory grants of jurisdiction used different language and reflected different policies. None said expressly that jurisdiction exists when rights are "'non-frivolously alleged to be' in issue," Pet. Br. 3, or where "specified rights are *colorably* in issue," Pet. Br. 29. Moreover, several of these contexts involved exclusive federal jurisdiction and had nothing to do with the allocation of jurisdiction between state and federal court. *See, e.g.*, *Morrison*, 561 U.S. at 254 n.3; *Eastern Enters.*, 524 U.S. at 520; *Williams*, 341 U.S. at 66; *cf.* Pet. Br. 4, 16, 35. But each statute authorized courts to decide a particular type of case. And

without regard to the statutes' particular text or policies, *cf.* U.S. Br. 26, the Court applied the settled rule that subject-matter jurisdiction—the courts' power to decide either way—is established when a plaintiff pleads a colorable claim within the defined category.

II. THE "NORMAL PRACTICE" APPLIES TO THE EXPROPRIATION EXCEPTION

Bell thus states a general rule that was "well settled" and widely applied long before Congress enacted the FSIA. *Bell*, 327 U.S. at 682. This Court "'presume[s] that Congress expects its statutes to be read in conformity with this Court's precedents,'" *Clay* v. *United States*, 537 U.S. 522, 527 (2003); that presumption applies equally in interpreting jurisdictional provisions under the FSIA, *see Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 237 (2007); *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 478 (2003) (construing FSIA "consistent with" longstanding jurisdictional principles). "Absent a clear statutory command to the contrary" in the FSIA, the Court should "assume that Congress is aware of the universality" of the jurisdictional practice under *Bell* and expected it to apply. *Powerex*, 551 U.S. at 237 (quotation marks omitted).

Nothing in the FSIA rebuts that presumption. It is true, as petitioners incant, that the FSIA contains "detailed federal law standards" that define the contours of immunity and "comprehensively regulat[e] the amenability of foreign nations to suit in the United States." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493-494 (1983). And of course courts must determine at the outset that the complaint "*actually* establishe[s]" the requirements of the relevant exception. Pet. Br. 22. But those propositions are not remotely inconsistent with applying *Bell*, because the relevant

requirement of the expropriation exception simply requires the assertion of a particular type of claim.

Section 1605(a)(3) contains two substantive requirements: (1) that a commercial-activity nexus to the United States exists—here, that the expropriated property or its proceeds are "owned or operated by an agency or instrumentality of the foreign state" that "is engaged in a commercial activity in the United States"—and (2) that "rights in property taken in violation of international law are in issue." Both of those requirements must "actually" be met. But the latter requirement is satisfied when the complaint actually places "in issue" a claim that rights in property have been taken in violation of international law. That is, it "requir[es] that [a] plaintiff assert a certain type of claim," *Agudas Chasidei Chabad* v. *Russian Fed'n*, 528 F.3d 934, 941 (D.C. Cir. 2008)—precisely the type of inquiry *Bell* governs. That reading is dictated by the FSIA's text, history and purpose, and structure.

A. The FSIA's Text Requires Plaintiffs To Place "In Issue" A Particular Type Of Claim

Section 1605(a)(3)'s condition that "rights in property taken in violation of international law are in issue" requires that the plaintiff put "in issue" a claim that its rights in property have been taken in violation of international law. Like many other jurisdictional grants, that condition confers authority "to decide a given type of case one way or the other." *Hagans*, 415 U.S. at 538. It does not require that the merit of the claim must already have been established.

As the United States recognizes, the phrase "in issue" typically means "under discussion" or "in dispute." U.S. Br. 15-16 (citing Garner, *A Dictionary of Modern*

Legal Usage 470 (2d ed. 1995)). The edition of Black's Law Dictionary in print when the FSIA was drafted reflects this understanding, indicating that a question raised by the pleadings is "at issue" if it is "affirmed on one side and denied on the other." *Black's Law Dictionary* 159 (4th ed. 1968). Rights in property taken in violation of international law are thus "in issue" if one side asserts a taking of rights in property in violation of international law and the other side denies it.

That interpretation of "in issue" accords with the phrase's natural meaning, as shown by its use in other contexts to refer to the subject of a dispute or argument presented for judicial resolution. The legal test for issue preclusion, for example, is often said to turn on whether a right or question was "in issue." *Aurora City* v. *West*, 74 U.S. (7 Wall.) 82, 98, 103 (1868); *see also, e.g.*, *Montana* v. *United States*, 440 U.S. 147, 153 (1979) (preclusion applies to "'right, question or fact distinctly put in issue and directly determined'"). These cases distinguish between the question "in issue" and the "determination of" that question. *Bates* v. *Bodie*, 245 U.S. 520, 526 (1918). The full faith and credit statute likewise ensures finality of matters "'properly put in issue and actually determined'" in prior proceedings. *San Remo Hotel, L.P.* v. *City & Cty. of San Francisco*, 545 U.S. 323, 337 (2005) (quoting *Southern Pac. R.R. Co.* v. *United States*, 168 U.S. 1, 49 (1897)). Similarly, a litigant is often said to open the door to argument or evidence on a particular subject by placing a contention "in issue" for resolution. *See, e.g.*, *Musacchio* v. *United States*, 136 S. Ct. 709, 718 (2016) ("statute-of-limitations defense becomes part of a case only if the defendant puts the defense in issue," triggering government's burden to establish compliance); *Simmons* v. *South Carolina*, 512 U.S. 154, 178 (1994)

(O'Connor, J., concurring in judgment) (where State "puts the defendant's future dangerousness in issue," due process entitles defendant to inform jury of parole ineligibility); *John Doe Co.* v. *United States*, 350 F.3d 299, 302 (2d Cir. 2003) (loss of attorney-client privilege resulting from assertion of factual claims is "described ... sometimes as *'at issue' waiver* because it results from the party having placed a contention at issue"). As in these contexts, Congress would naturally have understood and expected the phrase "in issue" to describe what the parties contested.

Comparison to § 1605(a)(4) reinforces this reading. Section 1605(a)(4) abrogates foreign sovereign immunity in "cases ... in which rights in property in the United States acquired by succession or gift ... are in issue." That exception permits litigation against foreign sovereigns concerning "disposition of the property of a deceased person." H.R. Rep. No. 94-1487, at 20 (1976); *see Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Gov't Relations of the H. Comm. on the Judiciary*, 93d Cong. 21 (1973) ("*1973 House Hearing*") (testimony of Hon. Charles N. Brower, Legal Adviser, Department of State) (§ 1605(a)(4) provided a "pretty clear exception for estate ... matters"). The purpose of the exception is to allow an orderly process for determining the rights of interested parties and disposing of property accordingly. It would make no sense to require the plaintiff first to establish those "rights in property" as a prerequisite to that orderly process. Rather, the exception turns on the type of claim at issue: whether "the sovereign's *claim* is as a successor to a private party." *In re Republic of Philippines*, 309 F.3d 1143, 1150 (9th Cir. 2002) (emphasis added); *see id.* at 1151 (no immunity where "foreign state *claims* the same right which is en-

joyed by private persons" (emphasis added; quotation marks omitted)). In such litigation, the validity of the sovereign's acquisition of rights in property is "in issue"—and therefore within the court's jurisdiction to determine—just as an expropriation claim puts "in issue" whether a sovereign took rights in property in violation of international law.

Petitioners rely heavily on *Permanent Mission of India* v. *City of New York*, 551 U.S. 193 (2007), which also considered § 1605(a)(4), but that decision supports the natural reading of "in issue." In *Permanent Mission*, the City of New York sued foreign governments "seeking declaratory judgments to establish the validity of [certain] tax liens" it held against the sovereigns' property. *Id.* at 196. The question was whether that action fell within the FSIA exception for "any case ... in which ... rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). The Court held that the City satisfied the exception by putting its alleged rights "in issue" without assessing whether the City would succeed in "establishing" the validity of the liens. 551 U.S. at 202 ("[A] suit *to establish* the validity of a tax lien places 'rights in immovable property ... in issue.'" (emphasis added)).

The Court took that approach even though the defendants claimed their property was "exempt from taxation pursuant to treaty." No. 06-134 U.S. Br. 4, 2007 WL 736599. If true, that would have meant that the City had no enforceable rights in property and that the defendants would have been entitled to dismissal for failure to state a claim. But the Court did not credit that argument, and it similarly refused to consider other arguments raised by the City that "ultimately [went] to the merits of the case." 551 U.S. at 201-202 & n.2. The Court explained: "Because the only question before

us is one of jurisdiction, and because the text and historical context of the FSIA demonstrate that petitioners are not immune from the City's suits, we leave these merits-related arguments to the lower courts." *Id.* at 202 n.2; *see infra* pp. 42-43.

In contrast to the use of "in issue" in these provisions, § 1610 allows attachment of a foreign sovereign's property where a judgment has already "establish[ed]" "rights in property which has been taken in violation of international law." 28 U.S.C. § 1610(a)(3). Congress could have used similar language in § 1605(a)(3) had it intended to limit the expropriation exception to cases in which an unlawful taking of rights in property had been "establish[ed]." It did not.

B. Congress Enacted The Expropriation Exception To Authorize U.S. Courts To Decide Whether Property Was Taken In Violation Of International Law

The history of the expropriation exception confirms that Congress intended it to authorize U.S. courts to decide certain claims: those asserting that property was taken in violation of international law.

Under the "absolute" theory of foreign sovereign immunity, foreign sovereigns could not be sued in U.S. courts without their consent, and courts generally deferred to the Executive Branch's "suggestions of immunity" in declining to exercise jurisdiction. *Verlinden*, 461 U.S. at 486-487. As foreign states increasingly engaged in commercial activity affecting U.S. interests, however, the State Department sought to "enable persons doing business with [foreign states] to have their rights determined in the courts." Letter from Acting Legal Adviser Tate to Acting Attorney General Perlman (1952), *reproduced in Alfred Dunhill of London,*

Inc. v. *Republic of Cuba*, 425 U.S. 682, 714 (1976) ("Tate Letter"). The State Department therefore abandoned the absolute theory in favor of the "restrictive" theory, which restricted foreign sovereign immunity to a state's "sovereign or public acts," while allowing claims to proceed "with respect to private acts." *Alfred Dunhill*, 425 U.S. at 711.

Even after the Tate Letter, however, "foreign nations often placed diplomatic pressure on the State Department," sometimes leading it to deviate from the restrictive theory. *Verlinden*, 461 U.S. at 487. As a result, "the governing standards were neither clear nor uniformly applied." *Id.* at 488. Congress responded by enacting the FSIA to depoliticize the immunity process and "'assur[e] litigants that ... decisions [would be] made on purely legal grounds and under procedures that insure due process.'" *Id.* (quoting H.R. Rep. No. 94-1487, at 7); *see Republic of Austria* v. *Altmann*, 541 U.S. 677, 689-691, 699 (2004). To that end, the FSIA shifted responsibility for deciding immunity questions from the Executive Branch to the courts, *Verlinden*, 461 U.S. at 487-488, and codified legal standards "provid[ing] when and how parties can maintain a lawsuit against a foreign state," H.R. Rep. No. 94-1487, at 6. Rather than reverting to a broader theory of immunity, those legal standards provided that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case" in which any of several exceptions is met. 28 U.S.C. § 1605(a).

The expropriation exception went further than the restrictive theory in limiting foreign sovereign immunity. Under the restrictive theory, sovereigns were immune from actions challenging "nationalization[s]" because they were "strictly political or public acts." *Vic-*

tory Transp. Inc. v. *Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964); *see* Note, *Avoiding Expropriation Loss*, 79 Harv. L. Rev. 1666, 1666 (1966). But years of mounting concern within the political branches at the threat to American interests posed by lawless foreign expropriations prompted the further restriction of sovereign immunity in expropriation cases.

As a 1963 report described, expropriation of American property abroad had increased substantially since 1945, *see* H. Comm. on Foreign Affairs, 88th Cong., *Report on Expropriation of American-Owned Property by Foreign Governments in the Twentieth Century* (Comm. Print 1963), 2 I.L.M. 1066, 1081 (1963), prompting legislative measures aiming to provide redress for U.S. victims of expropriation. For example, in 1964, Congress addressed roadblocks created by the act-of-state doctrine with legislation to "establish the presumption that private litigants are entitled to have a cause decided in accordance with the legal principles normally applied by our courts in cases properly within their jurisdiction." 110 Cong. Rec. 19513, 19547 (1964). The legislation, codified at 22 U.S.C. § 2370(e)(2), "ma[de] clear that Federal and State courts are to be free in cases before them involving acts of foreign states to enforce principles of international law, including the requirement for prompt, adequate and effective compensation in cases of expropriation." 110 Cong. Rec. A5153, A5157 (1964).

But that legislation did not address sovereign immunity and thus did not assuage the political branches' concerns over the "rising trend" of takings of U.S.-owned property abroad. U.S. Department of State, Bureau of Intelligence and Research, *Nationalization, Expropriation, and Other Takings of United States*

and Certain Foreign Property since 1960, Research Study RECS-14 (Nov. 30, 1971), 11 I.L.M. 84, 84 (1972).[6] Lawless foreign expropriation of U.S.-owned property increasingly jeopardized the security of U.S. investments and property rights. *Id.* It also affected the U.S. government, which often provided guarantees against expropriation for U.S. investments in developing countries, amounting to several hundred million dollars in Latin America alone. *Id.* at 86-87. Congress expressed particular concern that "radical governments" were targeting U.S. companies "as a means of striking a blow at the United States Government." S. Rep. No. 93-676, at 263 (1974).

Throughout this period, the Executive Branch took the view that "under international law, the United States has a right to expect: [t]hat any taking of American private property will be nondiscriminatory; that it will be for a public purpose; and that its citizens will receive prompt, adequate, and effective compensation from the expropriating country." White House Press Release, *U.S. Statement on Economic Assistance and Investment in Developing Nations* (Jan. 19, 1972), 11 I.L.M. 239, 241 (1972). But as the trend of expropriations grew, compensation—if offered at all—generally remained inadequate. *Id.* at 240. And U.S. persons whose property was taken without compensation often

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[6] *See also* U.S. Department of State, *Statement by the Department of State on Policy on "Hot" Libyan Oil*, 13 I.L.M. 767 (1974) (discussing 1973 nationalization of Libyan oil sector); S. Rep. No. 94-673, at 25 (1976) (discussing eight African expropriations in 1974); H.R. Rep. No. 94-541, at 31 (1975) (same); Comment, *American Oil Investors' Access to Domestic Courts in Foreign Nationalization Disputes*, 123 U. Pa. L. Rev. 610, 610 (1975) (by 1975, "threat of future nationalizations on a more extensive scale ha[d] become an imminent fear of the major oil investors").

lacked effective remedies. They could attempt to negotiate with the expropriating state, pursue remedies in the local courts of the expropriating state, or seek discretionary espousal of claims by the State Department, *see* Vandevelde, *Bilateral Investment Treaties* 23-26 (2010); in some cases, parties could pursue relief in arbitral tribunals or claims commissions established under international agreement, *id.* at 35-36, 283-284; Brownlie, *Principles of Public International Law* 522 (7th ed. 2008). These routes, however, rarely yielded adequate relief. *See Avoiding Expropriation Loss*, 79 Harv. L. Rev. at 1666-1667; Comment, *American Oil Investors' Access to Domestic Courts in Foreign Nationalization Disputes*, 123 U. Pa. L. Rev. 610, 612, 636-638 (1975). As the State Department acknowledged, the absence of a U.S. judicial forum often undermined the efficacy of these other options. U.S. Department of State, *Statement by the Department of State on Policy on "Hot" Libyan Oil*, 13 I.L.M. 767, 772 (1974). "[A]n important element of [any leverage] was legal action" in U.S. courts, *id.*, but at that time sovereign immunity blocked such suits, Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 Harv. L. Rev. 1607, 1618 (1962).

That was the backdrop when the Departments of State and Justice submitted draft legislation in 1973 that eventually became the FSIA and included a proposed exception for expropriation claims. *See 1973 House Hearing* 33-35 (letter from Attorney General Kleindeinst and Secretary of State Rogers (Jan. 16, 1973)). The expropriation exception reflects the political branches' decision, made after years of frustrated efforts to protect American investors through other means, to further restrict foreign sovereign immunity by authorizing courts to consider a particular type of

claim—namely, "expropriation claims" seeking redress for "nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law" and "takings which are arbitrary or discriminatory in nature." H.R. Rep. No. 94-1487, at 19-20. Congress also enacted measures to facilitate recovery of a remedy for plaintiffs that prevail in establishing a taking in violation of international law. *See* 28 U.S.C. § 1610(a)(3), (b)(2). Although some of those claims might fail, the point of the exception was to allow courts to decide them.

C. The FSIA's Structure Confirms That The Expropriation Exception Applies Where The Plaintiff Has Asserted A Colorable Expropriation Claim

Interpreting the expropriation exception to require plaintiffs to put a particular type of claim in issue aligns with the FSIA's other exceptions, which generally identify "types of actions for which foreign sovereigns may be held liable." *Verlinden*, 461 U.S. at 496-497.

Apart from the waiver exception, 28 U.S.C. § 1605(a)(1), each FSIA exception turns on certain characteristics of the claim. They generally require one or more of three types of conditions to be met: (1) that some nexus exists between the claim and the United States, (2) that some nexus exists between the claim and the sovereign's commercial activities, or (3) that the plaintiff asserts a particular type of claim. *See Verlinden*, 461 U.S. at 490, 496-497. The commercial-activity exception, for example, requires a nexus between the claim and the United States and between the claim and the sovereign's commercial activity, but does not require the plaintiff to assert any particular kind of claim. 28 U.S.C. § 1605(a)(2). The tort exception ap-

plies to a defined category of claims—those in which "money damages are sought" for torts meeting defined requirements—and requires a nexus between the claim and the United States, but does not require any tie to sovereign commercial activity. *See id.* § 1605(a)(5). The arbitration exception confers jurisdiction over certain types of claims—suits to enforce an arbitration agreement or confirm an arbitration award—where a nexus to the United States exists. *Id.* § 1605(a)(6). Section 1605(b) creates an exception to immunity for certain types of claims—suits in admiralty to enforce certain maritime liens—where there is a link to the sovereign's commercial activity. *Id.* § 1605(b); *see also id.* § 1605(d) (permitting actions to foreclose certain preferred mortgages); *id.* § 1605A (permitting actions "in which money damages are sought" for certain personal injuries); *id.* § 1607 (permitting certain categories of counterclaims).

Verlinden supports this understanding. That decision did not construe or apply any particular FSIA exception, but considered whether the jurisdiction the FSIA grants is within Article III's "arising under" clause. *See* 461 U.S. at 491-498.[7] The government emphasizes that in upholding the FSIA under Article III, the Court distinguished the FSIA's provisions "substantively regulating" foreign sovereign immunity from other jurisdictional grants that "'do nothing more than grant jurisdiction over a particular class of cases.'" U.S. Br. 13 (quoting *Verlinden*, 461 U.S. at 496). But *Verlinden* explained what "more" the FSIA entails, *id.*: Unlike other jurisdictional grants, the FSIA contains

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[7] The case thus had nothing to do with importing the well-pleaded complaint rule or any other aspect of § 1331 into the FSIA. *Cf.* Pet. Br. 36.

"substantive provisions requiring some form of substantial contact with the United States," 461 U.S. at 490, *in addition to* provisions "govern[ing] the types of actions for which foreign sovereigns may be held liable," *id.* at 496-497. *Verlinden* did not hold or even hint that actions under the FSIA would have to be resolved on the merits at the outset. *See also Altmann*, 541 U.S. at 695 (FSIA "opens United States courts to plaintiffs with pre-existing claims against foreign states" without imposing standards of liability).

Congress thus designed the FSIA to authorize courts to adjudicate particular "types of actions" against foreign sovereigns—the very sort of jurisdictional inquiry *Bell* governs—where "some form of substantial contact with the United States" exists. *Verlinden*, 461 U.S. at 490, 496. The expropriation exception is no different. Petitioners therefore err in contending (at 27) that applying *Bell* results in a "different standard for the expropriation exception." Under each exception, the court must determine whether the complaint "*actually* establishe[s]" the required elements. Pet. Br. 22. Where jurisdiction is asserted under the waiver exception, the court must find an actual waiver. Where jurisdiction rests on a commercial-activity nexus to the United States, the court must determine that the nexus actually exists. And where jurisdiction depends on the plaintiff having asserted a particular "type[] of action[]," *Verlinden*, 461 U.S. at 496, the court must determine that the claim is actually of that "type[]." That analysis is what is required for a court to "satisfy itself that one of the [FSIA's] exceptions applies" by "apply[ing] the detailed federal law standards set forth in the [FSIA]." *Id.* at 493-494. Applying *Bell* to determine that a claim is of the authorized "type[]" simply adheres to the "[n]ormal practice" that applies

whenever jurisdiction depends on the plaintiff having asserted a particular type of claim, *Jerome B. Grubart*, 513 U.S. at 537, and avoids the problematic consequences of turning every merits argument into a jurisdictional question, *Steel Co.*, 523 U.S. at 93.

Petitioners' reliance (at 24-26) on cases addressing the commercial-activity exception is therefore misplaced. *See also* U.S. Br. 18 n.3. That exception does not require assertion of any particular kind of claim. It requires instead a nexus between sovereign commercial activity and the United States. Thus, in *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 395 (2015), and *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 351 (1993), the Court did not examine whether the actions fell within a defined class, let alone whether the claims had merit. Instead, the Court examined whether the claims—whatever their nature—were "based upon" conduct that actually satisfied the nexus requirements. *Sachs*, 136 S. Ct. at 395; *Nelson*, 507 U.S. at 351.[8]

Petitioners' reliance on *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), fails for similar reasons. That case examined whether the tort exception, 28 U.S.C. § 1605(a)(5), conferred jurisdiction over a claim for damage sustained to plaintiffs' ship during a military attack near Argentina. The Court held that the claim could not proceed because the tort exception covers only "those cases in which the

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[8] Contrary to petitioners' assertion (at 26, 37), the Court did not "determine[] the viability" of the plaintiffs' claims in *Sachs* and *Nelson*, but merely identified the "allegedly" wrongful conduct to determine the gravamen of each suit according to the plaintiff's theory of the case. *Sachs*, 136 S. Ct. at 396; *see Nelson*, 507 U.S. at 358 (plaintiffs had not "alleged breach of contract," but "personal injuries caused by" intentional wrongs and failure to warn; "[t]hose torts ... form the basis for the ... suit").

damage to or loss of property occurs *in the United States*." 488 U.S. at 439-440. Like the nexus requirements of the expropriation exception or the commercial-activity exception, the requirement that an alleged tort "occur[] in the United States" is a nexus requirement that must actually be met for the claim to proceed, and the Court appropriately examined whether it was. *See id.* at 439-441. The Court did not consider whether the plaintiff asserted a tort within a defined class or evaluate the merit of that "alleged tort." *Id.*[9]

Petitioners' discussion of these cases completely misunderstands *Bell* and the significance of overlap between merits and jurisdiction. Petitioners appear to find these cases relevant because the jurisdictional analyses addressed points that pertained also to the merits; petitioners construe that "overlap" between jurisdiction and merits to mean the Court must have silently decided not to apply *Bell*. *See* Pet. Br. 22-26; *see also* U.S. Br. 29. But the controlling principle in *Bell* is that when a statute confers jurisdiction over a particular type of claim and the plaintiff asserts a substantial claim of that type, jurisdiction is not defeated by the possibility that the allegations might not entitle the

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[9] Petitioners give (at 23) the most expansive possible reading to the Court's statement that "none of the enumerated exceptions" applied. *Amerada Hess*, 488 U.S. at 443. Because that passing statement gave no reasoning and did not reveal what issues the Court might have considered, it provides no support for petitioners' analysis. *Cf. Steel Co.*, 523 U.S. at 91. The Court's rejection of the plaintiffs' reliance on certain international agreements also lends no support. *Cf.* Pet. Br. 23-24. The Court did not interpret any particular exception in light of those agreements or hold that jurisdiction was defeated due to a lack of merit in the claim; it considered only whether those agreements should be interpreted to "create an exception" due to a conflict with the FSIA. *Amerada Hess*, 488 U.S. at 441-442.

plaintiff to relief on the merits. *See Morrison*, 561 U.S. at 254; *Bell*, 327 U.S. at 682-683. That does not mean that the jurisdictional inquiry can never touch on issues that relate also to the merits—for example, by requiring a court to consider what elements a claim is "based upon" to determine whether the commercial-activity nexus exists. *See Sachs*, 136 S. Ct. at 395. It simply means that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Steel Co.*, 523 U.S. at 89. Petitioners and the government do not cite a single FSIA case in which this Court found jurisdiction lacking because the complaint failed to state a valid claim entitling the plaintiff to relief.

In *Permanent Mission*, for example, the City's claim satisfied § 1605(a)(4) by putting the City's rights "in issue," without regard to whether the City would succeed in establishing the validity of those rights. *See* 551 U.S. at 200 (action "*seeking the declaration of the validity* of a tax lien on property is a suit to establish an interest in such property" (emphasis added)); *id.* at 202 (suit "*to establish the validity* of a tax lien places 'right in immovable property ... in issue'" (emphasis added)).

Petitioners emphasize (at 26-27) *Permanent Mission*'s discussion of New York property law granting lienholders a nonpossessory interest in property. *See* 551 U.S. at 198. But the Court did not specify the standard it applied in considering the nature of the City's asserted rights. Neither the parties nor the government had addressed the relevant standard in their briefs, *see* No. 06-134 Pet. Br., 2007 WL 608160; No. 06-134 Resp. Br., 2007 WL 1033565; No. 06-134 U.S. Br., 2007 WL 736599, and the issue did not arise at oral argument, *see* No. 06-134 Oral Argument, 2007 WL 1198566 (Apr. 24, 2007). Petitioners infer that the

Court silently departed from *Bell* in conducting that inquiry; but that would have been a curious departure when, in the same opinion, the Court explicitly stressed the line between jurisdiction and the merits and explicitly held that the suit placed the City's lien rights "in issue" regardless of the validity of those rights or the defendants' obligation to pay. 551 U.S. at 200-202 & n.2. The better inference is that the Court simply did not consider or found it unnecessary to address *Bell*'s applicability.

In any event, such decisions that do not "'explicitly consider[]'" whether a defense goes to jurisdiction or the merits "should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit," *Arbaugh*, 546 U.S. at 511—particularly where, as in *Permanent Mission*, the "decision did not turn on that characterization, and the parties did not cross swords over it," *id.* at 512; *see also Steel Co.*, 523 U.S. at 91 ("fanciful to think [a prior decision] revised [the Court's] established jurisprudence" when the jurisdictional character of the issues decided "made no substantive difference, ... had been assumed by the parties, and was assumed without discussion by the Court"); *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993) (where the Court "at most assumed the applicability" of a particular standard, the Court is free to reevaluate whether that standard applies).

Finally, petitioners gain no support from the fact that foreign sovereigns are "ordinarily" and "normally" immune from suit under the FSIA. Pet. Br. 17, 21, 37-38. That is so only because claims falling outside the statutory exceptions cannot proceed—a restriction that bars a vast range of actions. But it is the "defendant['s] ... burden [to] prov[e] that the plaintiff's allegations do not bring its case within a statutory exception to im-

munity." *Phoenix Consulting, Inc.* v. *Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (quotation marks omitted); *see* H.R. Rep. No. 94-1487, at 17; 13A Fed. Proc. § 36:458 (Sept. 2016). And when a suit does implicate an exception, the statute does not suggest that jurisdiction should "ordinarily" fail or "place a heavy thumb on the immunity side of the scale." Pet. Br. 17, 37. It simply allows the suit to proceed, the point of which is to determine the sovereign's liability on the merits. *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 851 (2009). Nothing in the FSIA suggests that the determination of liability should precede or replace the immunity decision. Doing so would disregard the text, structure, and purposes of the FSIA, as well as "firmly established" jurisdictional practice, *Steel Co.*, 523 U.S. at 89.

III. Abandoning *Bell* Would Complicate FSIA Litigation And Undermine FSIA Policies

The Court has adhered to *Bell* in many contexts in part to avoid the consequences that would follow from equating the questions of jurisdiction and merits. *Supra* pp. 18-27. Petitioners' proposed rule—requiring a threshold jurisdictional determination that "rights in property" were in fact "taken in violation of international law"—would generate precisely the problems *Bell* seeks to avoid, while in no way protecting sovereign interests.

A. Petitioners' Rule Would Frontload The Burdens Of Litigation Into The Threshold Phase

Under petitioners' rule, a plaintiff must show at the outset that the defendant "*actually* violate[d] customary international law." Pet. Br. 27; *see id.* at 28-29; U.S. Br. 17 (jurisdiction exists only where "'international

law' has been 'violat[ed]'"). The primary effect of that requirement would be to frontload the determination of the merits into the earliest phase of FSIA litigation. Doing so would subject the sovereign defendant to substantially more burdensome litigation at the jurisdictional stage than if *Bell* applies.

For example, in expropriation cases where some compensation has been paid but the plaintiff challenges it as inadequate, jurisdiction would turn on whether the compensation was "prompt, adequate, and effective," as required by international law. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 429 (1964). Making that determination would require the court to interpret and apply those legal requirements, and potentially to receive expert testimony and other evidence to determine the value of the expropriated property. Similarly, where a plaintiff contends that a taking was "discriminatory" or "not for a public purpose," *id.*, the court would have to interpret those legal standards; and to the extent the defendant challenged those allegations as a factual matter, discovery into the motivations behind the taking would be required at the very outset to determine whether the foreign sovereign acted in an unreasonably discriminatory manner. *See Phoenix Consulting*, 216 F.3d at 40.

Petitioners seek to obscure this consequence of their position by asserting (at 29-30) that under their view, at the pleading stage, the district court would take the plaintiff's factual allegations as true and decide only their legal sufficiency to state a claim for relief. But under petitioners' theory, the line cannot be drawn at legal sufficiency—a point the United States appears to acknowledge (at 14 & n.2). As a procedural matter, FSIA defendants are not constrained to "challenge[] only the legal sufficiency of the plaintiff's jurisdictional

allegations," but may also "dispute ... the factual basis of the court's subject matter jurisdiction." *Phoenix Consulting*, 216 F.3d at 40. In that event, "the court may not deny the motion to dismiss merely by assuming the truth of the facts alleged by the plaintiff," but "must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Id.*; *see also* U.S. Br. 14 n.2 (citing authorities). Perhaps petitioners mean to suggest that a sovereign defendant should not be permitted to raise factual challenges in a motion to dismiss for lack of subject-matter jurisdiction; but petitioners themselves asserted such factual defenses here as to the expropriation exception's nexus requirements. *Supra* pp. 8, 12-13. They could as easily have chosen to contest whether the expropriation was in fact discriminatory. And if it is permissible for the defendant to challenge those allegations, it must be permissible for the plaintiff to obtain relevant discovery, and obligatory for the court to resolve the dispute. *Phoenix Consulting*, 216 F.3d at 40; U.S. Br. 14 n.2.

The logic of petitioners' theory also supports no distinction between legal and factual sufficiency. If, as petitioners' contend, jurisdiction under the expropriation exception required not just the assertion of a particular type of claim, but a definitive assessment that rights in property have been taken in violation of international law, *see* Pet. Br. 28-29, 33, then there would be no basis for allowing a claim to proceed if the defendant could show on the facts that no violation of international law had occurred. *See* U.S. Br. 8 (no jurisdiction where unlawful taking of rights in property "may have" occurred). Either the expropriation exception requires a threshold assessment of whether "'international law' has been 'violat[ed],'" U.S. Br. 17, or it does not. Peti-

tioners cite no principled reason why legal insufficiency on the merits should defeat jurisdiction but factual insufficiency should not.

Moreover, by turning those merits questions into jurisdictional ones, petitioners' approach would subject the merits determination to distinct rules concerning waiver and the courts' obligation to consider its jurisdiction *sua sponte*. *Steel Co.*, 523 U.S. at 92-93. Assuming a sovereign had not waived its immunity, "statutory arguments" as to whether a particular taking violated international law, "since they are 'jurisdictional,' would have to be considered by this Court even though not raised earlier in the litigation—indeed, this Court would have to raise them *sua sponte*." *Id.* at 93; *see also Arbaugh*, 546 U.S. at 514. If jurisdiction exists only in cases "in which 'international law' has been 'violat[ed],'" U.S. Br. 17, the court cannot bypass resolution of legal or factual disputes relevant to that question. *Steel Co.*, 523 U.S. at 93-101.

To make matters worse, courts generally permit immediate appeal of orders denying dismissal on sovereign immunity grounds under the collateral-order doctrine. *See Kilburn* v. *Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1126 (D.C. Cir. 2004); U.S. Br. 20. Under petitioners' rule, defendants would presumably seek interlocutory appeals of the expanded set of merits determinations required to establish jurisdiction. *See* U.S. Br. 31.[10] But piecemeal litigation punc-

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[10] Ordinarily, interlocutory appeals may proceed under the collateral-order doctrine because they are just that: collateral to and "completely separate from" the merits. *Kilburn*, 376 F.3d at 1126. Petitioners' conflation of the validity of the claim with the jurisdictional test under the expropriation exception is in substantial tension with that rule and raises the question whether inter-

tuated by interlocutory appeals is highly disfavored because it derails the orderly administration of justice and impairs finality. *E.g.*, *Johnson* v. *Jones*, 515 U.S. 304, 309-312 (1995). In FSIA litigation, the collateral-order doctrine already introduces extraordinary delays that undercut the access to U.S. courts that the FSIA was intended to ensure. Here, for example, five years have passed since the complaint was filed—six years since petitioners seized respondents' business—and respondents remain uncompensated while petitioners' jurisdictional challenges remain unresolved. *See also, e.g.*, *McKesson Corp.* v. *Islamic Republic of Iran*, 672 F.3d 1066, 1070 (D.C. Cir. 2012) ("after almost thirty years of effort," including five prior appeals, "this litigation has yet to definitively address ... whether this Court has jurisdiction over McKesson's claim"). Petitioners' rule would exponentially increase these burdens on courts and litigants.

By comparison, the litigation required to establish jurisdiction under the expropriation exception when *Bell* applies is far more efficient. To be sure, as petitioners note (at 42-43), jurisdictional discovery into factual issues concerning the nexus requirements may be necessary. Congress imposed strict factual nexus requirements that must be met before the case may proceed, and it contemplated that jurisdictional discovery would be appropriate. *See* H.R. Rep. No. 94-1487, at 17. Similar discovery is frequently necessary under other exceptions as well. *See, e.g.*, *Phoenix Consulting*, 216 F.3d at 41 (remanding for discovery as to whether contract waiving immunity was forged); *Intelsat Global Sales & Mktg., Ltd.* v. *Community of Yugoslav Posts*

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locutory appeal should even be allowed—a result that certainly would not shield sovereigns from the burdens of litigation.

Telegraphs & Telephones, 534 F. Supp. 2d 32, 36 (D.D.C. 2008) (discovery warranted as to whether defendant was an "agency or instrumentality"); *Lee* v. *Taipei Econ. & Cultural Representative Office*, 716 F Supp. 2d 626, 632 (S.D. Tex. 2009) (ordering limited discovery to determine whether activities were "commercial" under commercial-activity exception).

Tailored jurisdictional discovery is consistent with the FSIA's presumption of immunity. The purpose of such discovery is to test the defendant's assertion of immunity. Fairness dictates that the defendant cannot assert immunity based on a factual argument and then preclude discovery into the basis of the assertion. FSIA jurisdictional discovery is also far narrower than the "full-blown discovery" petitioners fear (at 42). Rather than encompassing all "nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case," Fed. R. Civ. P. 26(b), jurisdictional discovery must be "'carefully controlled and limited,'" and requires a nexus between each discovery request and the defendant's factual challenge to jurisdiction, as the district court required here. *See Helmerich & Payne Int'l Drilling Co.* v. *Bolivarian Republic of Venezuela*, 2016 WL 2771117, at *3 (D.D.C. May 13, 2016); *see also, e.g., id.* at *7-11 (scrutinizing predicate for respondents' discovery and conducting request-by-request, interrogatory-by-interrogatory review of permissible discovery); *In re Papandreou*, 139 F.3d 247, 252-254 (D.C. Cir. 1998) (issuing writ of mandamus to restrain unwarranted FSIA jurisdictional discovery). Once jurisdiction is established, the defendant can promptly move to dismiss for failure to state a claim. Only then, if the motion is denied, would merits discovery proceed.

Petitioners' objections to the alleged burdens of jurisdictional discovery make one thing clear: Their real complaint stems not so much from the lower courts' adherence to *Bell*, as from the courts' adherence to the holding of *Steel Co.* that a court cannot assume that jurisdiction exists and skip ahead to merits questions it views as more readily resolved, *see* 523 U.S. at 93-94. Like many litigants in many contexts, petitioners would prefer to litigate the Rule 12(b)(6) legal question—whether respondents have stated a violation of international law for which they are entitled to relief—without first litigating jurisdiction. *See* Pet. Br. 42-43. Petitioners took a similar tack in urging the lower courts to resolve their merits defense under the act-of-state doctrine before resolving subject-matter jurisdiction. JA142-146, 187-188; Pet. Br. 9 n.1. Here, petitioners seek to equate the legal sufficiency of the claim on its merits with the jurisdictional question, in defiance of *Bell*, to achieve an end-run around *Steel Co.* and allow determination of the 12(b)(6) question before litigating the jurisdictional nexus requirements. But this Court has explained why that approach is both impermissible as a separation-of-powers matter and seriously ill-advised as a practical matter. *See Steel Co.*, 523 U.S. at 92-102; *Ruhrgas*, 526 U.S. at 583.

On the other hand, adhering to ordinary practice under *Bell* and *Steel Co.* respects the limits of courts' authority to address merits issues before establishing jurisdiction, confines initial discovery to those fact-based jurisdictional challenges to the nexus requirement that the sovereign chooses to mount, and appropriately defers the burdens of litigating the plaintiff's entitlement to relief to the merits stage. Abandoning *Bell* frontloads those burdens into the jurisdictional

phase, at the expense of further delay and prejudice to both parties.

B. Abandoning *Bell* Would Serve No Other Policy

Petitioners warn (at 28, 41) that adhering to *Bell* will allow plaintiffs to escape rigorous jurisdictional scrutiny through "artful pleading." That criticism is directed primarily at the court of appeals' decision in *Simon* v. *Republic of Hungary*, 812 F.3d 127, 141 (D.C. Cir. 2016), which considered the standard a court should apply in evaluating its jurisdiction under the expropriation exception over "garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution" when a violation of international law (there, genocide) had been shown. *See* U.S. Br. 28, 30. Whether *Simon* decided that question correctly is not presented; but even assuming it did, there are many reasons why the prospect of artful pleading is not a meaningful concern here.[11]

Bell contemplates dismissal of claims "made solely for the purpose of obtaining jurisdiction," 327 U.S. at 682, and courts regularly dismiss complaints that merely "recite" a claim simply "to avoid jurisdictional dismissal[]," Pet. Br. 41; *see Nelson*, 507 U.S. at 363; *Williams* v. *Aztar Ind. Gaming Corp.*, 351 F.3d 294, 299-300 (7th Cir. 2003) (RICO theory was "so transparent an attempt to move a state-law dispute to federal court" that court lacked federal-question jurisdiction); *Holloway* v. *Schweiker*, 724 F.2d 1102, 1105 (4th Cir. 1984) (affirming dismissal for lack of jurisdiction where

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[11] Where a tort claim effectively contests whether rights in property were taken in violation of international law, and is not simply "incidental to" ownership of such property, *see Permanent Mission*, 551 U.S. at 200, *Bell* arguably *should* apply.

"pleading in constitutional terms appear[ed] to be designed solely for the purpose of obtaining jurisdiction"); *Local Div. 732, Amalgamated Transit Union* v. *Metropolitan Atlanta Rapid Transit Auth.*, 667 F.2d 1327, 1341-1342 (11th Cir. 1982) (where claim purported to enforce federal statute, but sought only common-law remedies, it was "abundantly clear" the claim was "made solely for the purpose of obtaining jurisdiction").

Petitioners' warnings also overlook the FSIA's nexus requirements, which must be satisfied at the threshold of every case. These requirements turn away suits that lack sufficient connection to the United States, as well as those lacking a connection to sovereign commercial activity. *See, e.g.*, *Ezeiruaku* v. *Bull*, 617 F. App'x 179, 182 (3d Cir. 2015) (per curiam) (plaintiff failed to allege that defendant engaged in commercial activity in the United States); *Best Med. Belgium, Inc.* v. *Kingdom of Belgium*, 913 F. Supp. 2d 230, 240-241 (E.D. Va. 2012) (plaintiff failed to satisfy either nexus requirement).

The government suggests (at 21) the additional concern that adhering to *Bell* could negatively affect the "'reciprocal self-interest'" of the United States by inviting foreign courts to apply a standard akin to *Bell* to determine the United States' immunity from suit—the same standard that governs the United States' immunity from suit in U.S. courts under the Tucker Act, *supra* p. 25-26. That supposed concern rests on the fallacy that applying *Bell* means forgoing a "full substantive determination of immunity." U.S. Br. 22. As discussed, determining that the nexus requirements are actually met and that the plaintiff has actually put in issue a substantial claim that rights in property were taken in violation of international law *is* the "full substantive determination" of immunity and subject-

matter jurisdiction that the FSIA requires. *Supra* pp. 27-44.

In any event, the government's tally (at 21) of cases in which the United States is a party is highly misleading. The cited statistics include suits against *and by* the government; and they include a wide variety of actions. *See* U.S. Dep't of Justice, *Office of Foreign Litigation*, https://www.justice.gov/civil/office-foreign-litigation (last updated Oct. 20, 2014). The government relies on these generic statistics for good reason: Neither petitioners nor the government have identified a single expropriation claim brought against the United States in a foreign court. *See also* U.S. Dep't of State, *Digest of United States Practice in International Law* (1989-2015 eds.) (citing no expropriation claims against the United States in foreign courts). That is not surprising, as the United States, unlike Venezuela, is not generally in the business of confiscating private property without paying for it or discriminating against property owners because of their nationality; and U.S. courts, unlike Venezuela's, routinely adjudicate takings claims fairly and impartially.

The government also posits (at 20) that abandoning *Bell* would better "preserve the dignity of foreign sovereigns" and "ensure comity between nations." The argument again assumes its conclusion: Adhering to *Bell* does not forgo the "substantive legal determination that the [expropriation] exception[] dictate[s]," U.S. Br. 20, because the exception does not require plaintiffs to prove their entitlement to relief to establish jurisdiction. If anything, it is petitioners' proposed rule that would provoke a far more significant affront to sovereign dignity and international comity. By frontloading the determination whether "'international law' has been 'violat[ed]'" into the jurisdictional phase, *id.* at 17,

petitioners' approach would encourage judicial pronouncements upon the unlawfulness of foreign sovereign conduct that in many cases could be avoided once jurisdiction has been established under *Bell* if, for example, the act-of-state doctrine or another defense applied. *See Altmann*, 541 U.S. at 700 ("Unlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits."). By adhering to *Bell*, in contrast, a court can dispose of a substantial but non-meritorious expropriation claim on such grounds without declaring that the sovereign violated international law.

Finally, the government's invocation of comity should be placed in proper context. As discussed, before the FSIA's passage, the restrictive theory did not accommodate any exception to immunity for expropriation claims. *Supra* pp. 33-34. After extended consideration, Congress and the Executive Branch created the expropriation exception to afford plaintiffs an opportunity to seek redress for unlawful takings, following decades in which many foreign sovereigns displayed an extraordinary lack of comity toward the United States by expropriating U.S.-owned interests without compensation—sometimes *because* they were American, as petitioners did here. *Supra* pp. 5-6, 33-37. The government's views on the interpretation of that exception "merit no special deference." *Altmann*, 541 U.S. at 701. If the government now believes (at 21) that displacing nearly two centuries of jurisdictional practice is necessary to prevent "perceived affronts" to the dignity of foreign sovereigns that lawlessly target U.S. property for expropriation, its recourse is to propose an amendment to the FSIA to effectuate that intent. *See Pow-erex*, 551 U.S. at 237-238. Absent anything to that ef-

fect in the statute as written, the Court should adhere to its long-standing practice, of which Congress was presumptively aware in enacting the FSIA, and to the textual requirement that jurisdiction turns on the nexus requirements and the type of dispute "in issue."[12]

CONCLUSION

The judgment should be affirmed.

Respectfully submitted.

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[12] Should the Court disagree with that view, the only outcome fairly within the scope of the question presented would be to remand for the court of appeals to consider petitioners' motion to dismiss under a different standard in the first instance. *See* U.S. Br. 34; *compare* Pet. Br. 48 (suggesting reversal), *with, e.g.*, Shapiro et al., *Supreme Court Practice* 340 (10th ed. 2013) ("An order limiting the grant of certiorari to certain questions is binding upon counsel, and argument ordinarily will not be heard on questions outside the scope of the order."); *Roberts* v. *Galen of Va., Inc.*, 525 U.S. 249, 253-254 & n.2 (1999) (per curiam).